Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

M. MAUREEN POLSBY, M.D.
Petitioner,

v.

STEVEN G. SPRUILL, ULDIS KLAVINS,
THE HEARST CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether current procedures in the D.C. Circuit, which permit motions for summary affirmance to be granted without the appellant being given the opportunity to raise issues on appeal and to file an appeal brief, deny appellants due process of law and equal protection under the law, and whether these practices in the D.C. Circuit violate the intent of the statute which created the federal circuit courts of appeal, a statute designed to relieve the Supreme Court of obligatory review of district court cases.

2. Whether it was proper for the D.C. Circuit to grant summary affirmance in *Polsby v. Spruill,* a complex case concerning several interrelated tort claims in the specialized and rapidly-evolving area of intellectual property law, including the right of publicity, a case of first impression for the D.C. Circuit.

3. Whether authors and publishers may, without authorization or compensation, exploit the commercial value of an individual's persona and life experiences, usurp that individual's property rights and invade her privacy by publishing fiction in which she is still clearly recognizable as her and only her, and publish an illustration of her, also without permission or compensation.

4. Whether an individual becomes a public figure by agreeing to testify at a congressional hearing and whether the reading in public of what an author has written thereby places that writing in the public domain.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
INTRODUCTION	2
STATEMENT	7
A. Factual Background	7
1. Factual Background of the Case of *Polsby v. Shalala* (upon which respondents based their novel)	7
2. Respondents' Novel	8
B. The Proceedings Below	10
REASONS FOR GRANTING THE PETITION	17
I. SUMMARY AFFIRMANCE PROCEDURES IN THE D.C. CIRCUIT, AS EXEMPLIFIED BY THEIR APPLICATION IN THE INSTANT CASE, DENY APPELLANTS DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE LAW, ARE IN VIOLATION OF THE INTENT OF THE STATUTE WHICH CREATED THE FEDERAL CIRCUIT COURTS OF APPEAL, AND CONFLICT WITH PRACTICES IN OTHER CIRCUITS. THIS COURT SHOULD PROVIDE GUIDANCE TO THE CIRCUITS AS TO WHAT CASES AND PROCEDURES ARE APPROPRIATE FOR SUMMARY AFFIRMANCE	17

TABLE OF CONTENTS—Continued

Page

II. THIS CASE WAS INAPPROPRIATE FOR SUMMARY AFFIRMANCE BECAUSE IT IS A CASE OF FIRST IMPRESSION FOR THE CIRCUIT, INVOLVING THE NEWLY-RECOGNIZED RIGHT OF PUBLICITY, AND IS A COMPLEX CASE IN A HIGHLY SPECIALIZED AND RAPIDLY-EVOLVING AREA OF THE LAW 19

III. COURTS MUST RECOGNIZE A PROPERTY INTEREST COMMONLY RECOGNIZED BY OUR SOCIETY: THAT AN INDIVIDUAL, WHETHER A PUBLIC FIGURE OR NOT, OWNS THE COMMERCIAL VALUE OF HIS OR HER IDENTITY, INCLUDING THE INDIVIDUAL'S PERSONA, IMAGE OR LIFE EXPERIENCES AS DEPICTED IN A WORK OF FICTION WHICH IS MARKETED FOR ITS ENTERTAINMENT VALUE 20

IV. ACCEPTING AN INVITATION TO TESTIFY BEFORE CONGRESS DOES NOT MAKE AN INDIVIDUAL A PUBLIC FIGURE IN THE SAME SENSE THAT POLITICIANS AND ENTERTAINERS ARE PUBLIC FIGURES, NOR DOES READING A PREPARED STATEMENT IN PUBLIC PUT THAT STATEMENT IN THE PUBLIC DOMAIN 22

CONCLUSION 25

TABLE OF AUTHORITIES

CASES Page

Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) 21
Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953) 21
In re Woods, 143 U.S. 202 (1892) 17
Lane v. Random House, Inc., 23 Media L. Rep. (BNA) 1385 (D.D.C. 1995) 20
McLish v. Roff, 141 U.S. 661, 666 (1891) 17
Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) 23
Polsby v. Shalala, 507 U.S. 1048 (1993) 2, 3, 6, 7, 10, 12
Polydoros v. Twentieth Century Fox Film Corp., 948 P.2d 409, 69 Cal. Rptr. 2d 897 (Cal. Nov. 19, 1997) (No. 5064868) 21, 22
Robinson v. Shell Oil Co., 519 U.S. 337 (1997)..... 2, 3
Sheldon v. Metro-Goldwyn Pictures, Corporation, 81 F.2d 49 (2nd Cir. 1936) 23, 24
United States v. Glover, 731 F.2d 41 (1984)..... 18
Warren E. Spahn v. Julian Messner, Inc., 250 N.Y.S.2d 529 (1964) 21

STATUTES AND REGULATIONS

Federal Rules of Civil Procedure (Fed. R. Civ. P.), Rules 12(b) (6) and 56 .....2, 4, 14, 16
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 3
26 Stat. 826 (1891) 17
28 U.S.C. § 1254(1) 2

OTHER

The Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit 20
McCarthy, *McCarthy on Trademarks*, § 28.01[1] (June, 1996 rev.) 21
Restatement (Second) of Torts § 652C (1977)..... 21
Restatement of the Law (Third) of Unfair Competition § 46 (1995) 21, 23

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PETITION FOR A WRIT OF CERTIORARI

M. Maureen Polsby, M.D., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The court of appeals issued no opinion, either published or unpublished, only an order (App., *infra*, 1a) granting summary affirmance for the reasons stated in the

district court's published opinion (App., *infra*, 2a-21a). The district court's opinion is reported at 1997 U.S. Dist. LEXIS 11621; 43 U.S.P.Q.2d (BNA) 1904; 25 Media L. Rep. 2259. The district court's earlier opinion (App., *infra*, 22a-25a), dismissing defendant Klavins, is unreported. The district court dismissed petitioner's civil action on the basis of Fed. R. Civ. P., Rules 12(b)(6) and 56, prior to discovery. The claims had been researched and the complaint written and originally filed by a major international law firm, that of Winthrop, Simpson, Putnam, and Roberts, of New York.

JURISDICTION

The court of appeals entered its order for summary affirmance (App., *infra*, 1a) on March 11, 1998. The court of appeals denied Dr. Polsby's petition for rehearing and suggestion for rehearing *en banc* on May 27, 1998 (App., *infra*, 26a-27a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

Petitioner Dr. Polsby has filed several civil suits arising from related facts. This Court granted her previous petition for a writ of *certiorari* to the Fourth Circuit in one of them, *Polsby v. Shalala*, 507 U.S. 1048 (1993), and indirectly a second time in that case via *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Robinson had lost his case in district court because of the precedent set by the Fourth Circuit on a second issue in *Polsby*, before it was vacated. The Fourth Circuit, *en banc*, in *Robinson*, then reiterated the position it had taken on the second issue in *Polsby* and affirmed the district court's dismissal of Robinson's case. This Court then granted Robinson's petition for a writ of *certiorari* and reversed the Fourth Circuit *Robinson* opinion as well. Thus this Court has twice reversed the Fourth Circuit's original *Polsby* decision on two separate issues.

Dr. Polsby is currently again before the Fourth Circuit in *Polsby v. Shalala* and is entitled to prevail, in part, because of an adverse ruling made by the district court due to the Fourth Circuit's reiteration of the second issue in *Polsby* in its *en banc Robinson* opinion. The *en banc Robinson* opinion was issued just before Dr. Polsby's trial, and this Court did not reverse it until after Dr. Polsby's trial.

That issue was whether *former* employees are protected against retaliation under Title VII of the Civil Rights Act of 1964. After filing an EEO complaint, Dr. Polsby was denied residency credit which she had been promised for doing a research fellowship at the National Institutes of Health (NIH). She applied for the residency credit just after the end of her fellowship and after filing an EEO complaint over the way she had been treated during the fellowship. Therefore, she was a former employee when the retaliation occurred. The district court dismissed Dr. Polsby's retaliation claims, just prior to trial, on the basis of the Fourth Circuit's *en banc Robinson* opinion, which, as stated above, this Court later reversed.

In the instant case, *Polsby v. Spruill*, respondents wrote a novel based on *Polsby v. Shalala* in which the lead character is clearly identifiable as Dr. Polsby and only Dr. Polsby. A condensed version of the novel was published by respondent Hearst Corporation in *Good Housekeeping* magazine and included a drawing of Dr. Polsby (Lodged Materials 1). The drawing seems most likely taken from a photograph of her (Lodged Materials 2) which appeared in several news stories about her case. The district court opinion in *Polsby v. Spruill*, which was summarily affirmed by the D.C. Circuit, ignored Dr. Polsby's claim of the unauthorized use of her image.

A reading of the district court opinion suggests that the district court judge improperly based his decision on his opinion of the merits of *Polsby v. Spruill, i.e.*, on whether

the judge believed the novel was patterned after Dr. Polsby's case against NIH, rather than whether Dr. Polsby had failed to state a claim under the Fed. R. Civ. P., Rule 12(b)(6). Judicial fact-finding, if such was the case, was improper prior to discovery and in a case in which the plaintiff was entitled to a jury trial. It also precluded his decision in respondents' favor under Fed. R. Civ. P., Rule 56. The district court opinion was written in a way which also suggests that the judge may have been biased against Dr. Polsby because of her civil rights litigation and other litigation against the government also pending before him at the time of his decision. In the D.C. Circuit, all complaints of a *pro se* litigant are assigned to the same judge.

However, the principal question petitioner would like the Court to address is whether she should have been allowed to raise issues on appeal, present her arguments in a proper appeal brief, and receive consideration by a three-judge panel. Procedure and practice in the D.C. Circuit, in contrast to the procedures and practices of other circuits, effectively denied Dr. Polsby her right to an appeal.

In the D.C. Circuit cases are "screened" by a staff attorney's office, the personnel of which includes law students, before the cases go to any of the appellate judges or their clerks. At the outset, appellees are allowed to file motions for summary affirmance. The appellant then responds to the issues the appellee has raised rather than being able to raise her own issues on appeal. The appellee then replies, thereby getting both the first and last word, i.e., the reverse of what happens in a normal appeal. The appellee already has the advantage of having prevailed in the lower court. The summary affirmance procedure in the D.C. Circuit unfairly shifts the advantage further away from the appellant by denying the appellant the opportunity to raise issues on appeal, by putting the appellant in the defensive position, and by giving the appellee both first and last word.

The staff attorney's office then prepares a memorandum and makes a recommendation as to whether the motion for summary affirmance should be granted. The motion is decided in a brief meeting in which two judges review a number of motions and grant summary affirmance largely on the basis of the memos from the staff attorney's office. In the instant case, the opinion of the staff attorney's office was "rubber-stamped" in a one-sentence order. That was the end of Dr. Polsby's appeal. Dr. Polsby was not allowed to raise her own issues on appeal and file a proper appeal brief, nor was her response to the motion for summary affirmance likely to have even been read by any of the judges or their clerks.

Moreover, it is possible that the D.C. Circuit's summary affirmance procedures may afford room for improper influence upon members of the staff attorney's office. A layer of personnel, whose memos can greatly affect the outcome of a case, has now been placed between the appellant and the judges and their clerks. This staff is not subject to the confirmation procedure, nor is it supervised the way judges supervise their clerks.

Dr. Polsby appreciates that burgeoning case loads have created an impossible situation for the courts. Overworked judges and their law clerks feel the need to get rid of cases and may be all too tempted to trust the staff attorney's office to make their decisions for them. However, the solution to this problem should not be to deny appellants the right to an appeal in complex cases such as this one. It may be that for certain types of cases a summary affirmance procedure would be appropriate. It may also be that if petitioner had been allowed to raise her issues on appeal and file a proper appeal brief, and had received proper consideration from a three-judge panel, she would have lost her appeal anyway. Nonetheless, she was entitled to appeal the dismissal of her case. *Polsby v. Spruill* is a complex case and a case of first impression in the D.C. Circuit. It involves several inter-

related tort claims in the rapidly-evolving area of intellectual property law. Dr. Polsby's complaint had been meticulously researched and writted by a major law firm prior to being filed. It is simply not credible that the dismissal of such a case deserved summary affirmance. If lower court decisions in cases such as this one are being summarily affirmed, then something is very wrong in the D.C. Circuit.

Although petitioner is not entitled to review by this Court, the Court does have a duty to supervise the circuit courts of appeal. This Court should pay special attention to cases in which the appellant was deprived of the right to an appeal. Even though petitioner is not entitled to a review of her case by this Court, she was entitled to a review of her case by the D.C. Circuit. She was entitled to an appeal. She did not get one.

Even in this Court, which is acknowledged to have discretionary review, every petition is read and considered by individuals of the calibre and background of Supreme Court clerks under the supervision of the Justices. There is no separate staff attorney's office which "screens" cases for the U.S. Supreme Court. Even if Dr. Polsby's petition is not granted, it is likely her case will have received more attention and proper consideration in this Court than the short shrift it got in the D.C. Circuit.

Although Dr. Polsby's principal question for the Court is whether she was denied due process of law, and equal protection under the law, by being denied a proper appeal in a complex case of first impression, she will nonetheless begin her statement of the case with the factual background and claims presented in the lower court case. The factual background of *Polsby v. Spruill*, moreover, comprises the factual background of *Polsby v. Shalala*.

STATEMENT

A. Factual Background

1. *Factual Background of the case of* Polsby v. Shalala *(upon which respondents based their novel)*

Dr. Polsby was serving as Chief Resident in Neurology at a hospital in Boston when she was approached at a Boston medical meeting by Dr. Thomas Chase, a senior scientist from the National Institute of Health (NIH). Dr. Chase recruited Dr. Polsby to be his research fellow and promised her that she could get credit for the remainder of her residency from NIH. At that time NIH was accredited for up to one year of the three-year neurology residency training requirement.

Later, at a medical meeting in San Diego, just before the beginning of her NIH fellowship and after Dr. Polsby had already left her residency a few months earlier than she otherwise would have done, Dr. Chase maneuvered Dr. Polsby into his hotel room on a pretext, made sexual advances, including forcing a kiss on her, and expected her to begin an affair with him. She declined his advances in a tactful manner. Dr. Polsby hoped Dr. Chase would forget the incident and knew that her future depended on whether Dr. Chase would help further her career in academic medicine.

Dr. Polsby was Dr. Chase's first female medical staff fellow. When she arrived at NIH, she discovered that Dr. Chase had a reputation as a womanizer. She was appalled when she realized what members of the department believed about why she had been given the prestigious fellowship.

Dr. Chase assigned her the entirety of the lowest level duties which had previously been equally shared among the fellows, who were previously all male. He largely ignored her, even though he was her mentor. Later, he and two of the other male scientists in the department,

one of whom was junior to Dr. Polsby, misappropriated her research and published it as their own work.

After two years, Dr. Polsby's fellowship was not extended as was customary for fellows who wished to continue in the field of medical research and academic medicine. At the end of her fellowship, when Dr. Polsby finally filed an EEO complaint about the differential treatment and, in particular, the theft of her research, she was denied the residency credit she had been promised. The retaliation against her, by denial of the residency credit, effectively derailed and destroyed Dr. Polsby's career.

A few years after Dr. Polsby left NIH, one of her former NIH patients, a man named Mr. Duggan, called her to tell her he had discovered problems with respect to the research he and other patients had participated in at NIH. Mr. Duggan had taken it upon himself to read the papers published by the male fellows who had misappropriated Dr. Polsby's research. Mr. Duggan discovered that instead of finishing what Dr. Polsby had begun, Dr. Chase and the others had largely fabricated much of the remaining data. After Mr. Duggan made this discovery and told Dr. Polsby, he and Dr. Polsby continued to be in communication and have worked together to try to expose the fraud. (See App., *infra*, 28a-32a, and Lodged Materials 3-4: "Harassment linked to fraud, lawsuit alleges," JAMA, February 12, 1992, volume 267, No. 6).

2. *Respondents' Novel*

Respondents have published a novel, and also a condensed version of it in *Good Housekeeping* magazine, which takes place at NIH in the same institute at NIH in which Dr. Polsby did her fellowship. The institute for neurology and neurosurgery is one of the dozen plus institutes which comprise NIH. The lead character in the novel, Dr. Lord, is a female neurosurgeon doing her residency as a research associate of a senior scientist at NIH, Dr. Lancaster. Dr. Lancaster happens to live in a house

that closely fits the description of Dr. Chase's actual house.

Dr. Lancaster makes a one-time "pass" at Dr. Lord. He corners her in the laboratory, forces a kiss on her, and expects her to begin an affair with him. She turns him down.

Subsequently, Dr. Lancaster largely ignores Dr. Lord. The fact that Dr. Lord is the first female fellow Dr. Lancaster has recruited in many years becomes the cause of speculation in the department about whether Dr. Lancaster hired Dr. Lord because he had a personal interest in her. Dr. Lancaster ultimately does not invite Dr. Lord to continue at NIH and denies her residency credit he had promised. Her career as a neurosurgeon is destroyed because of the denial of residency credit. (It is of interest that Dr. Lord is doing a three-year residency at NIH. The allegedly fictional Dr. Lord is a neurosurgeon, whereas Dr. Polsby is a neurologist, yet the neurology residency is three years and the neurosurgery residency is seven years. Also, it is somewhat unusual for fellows to do residencies at NIH. Although NIH is accredited for residency training, most fellows come to NIH having already completed their residencies.)

A few years after Dr. Lord leaves NIH, she is contacted by a former NIH patient, named Mr. Dugan. Mr. Dugan tells Dr. Lord that there are problems with the research project in which Mr. Dugan had participated with Dr. Lord under the aegis of Dr. Lancaster. Thereafter, the novel consists of a series of adventures involving Dr. Lord and Mr. Dugan attempting to expose the research problems, and Dr. Lancaster and the government medical establishment trying to cover them up. The condensed version of the story, published in *Good Housekeeping* magazine, includes a drawing of Dr. Lord (Lodged Materials 1) which looks like Dr. Polsby. A photograph of Dr. Polsby (Lodged Materials 2) appeared in several news stories about her case against NIH.

B. The Proceedings Below

The original complaint was filed on petitioner's behalf by the firm of Winthrop, Stimson, Putnam and Roberts. Winthrop is a large international law firm based in New York City. Winthrop, together with the firm of Mayer, Brown and Platt, represented petitioner, *pro bono*, before this Court when her petition for a writ of *certiorari* in *Polsby v. Shalala* was granted. Later, in early 1994, Winthrop was still representing petitioner and was preparing for the trial in *Polsby v. Shalala*, when respondents' novel appeared. Winthrop took the second case on a contingent fee basis and spent eight months carefully researching the claims and drafting the complaint and filing it in U.S. District Court for the District of Columbia.

The complaint filed by Winthrop was forty pages long. It detailed the numerous similarities between Dr. Polsby's persona, image and experiences and those of the purportedly fictional Dr. Lord. For example, the name of the actual NIH patient who discovered the fraudulent research, and told Dr. Polsby about it, is named *Duggan*. In defendants' story, the allegedly fictional NIH patient, who tells Dr. Lord the research is defective, has almost the same name: *Dugan*. In the context of the story and the multiple other similarities, such as both Dr. Polsby's and Dr. Lord's careers being destroyed by denial of residency credit for a three-year residency, makes the likelihood almost zero that defendants independently created their story, as they claim.

The fourteen-count complaint alleged infringement of Dr. Polsby's right of publicity, which is a case of first impression for the D.C. Circuit. The complaint also asserted misappropriation of Dr. Polsby's likeness, persona and image, negligent false light for certain actions of Dr. Lord which did not happen (for example, a romantic relationship between Dr. Polsby and her patient, Mr. Duggan), malicious false light, because defendants would

have known, or should have known, that readers would recognize Dr. Lord as Dr. Polsby (which they did [1]), negligent defamation, malicious defamation, and intentional infliction of emotional distress.

However, the original publisher of the novel, St. Martin's Press, was not named in the complaint, nor were copyright infringement claims asserted. This was due to the fact that St. Martin's Press was also a Winthrop client. The complaint covered only the publication of the condensed version in *Good Housekeeping* and the common law tort claims. After filing the complaint, Winthrop learned that St. Martin's Press was, by agreement, nevertheless liable for any damages arising from the publication in *Good Housekeeping*. Therefore, Winthrop withdrew the complaint under a tolling agreement and withdrew from the case.

Dr. Polsby obtained new counsel, on an emergency basis, in order to refile the complaint. This time the complaint was filed in state court (D.C. Superior Court). Petitioner ultimately began representing herself. The large firms she approached, which had expertise in intellectual property law, all had conflicts with one of the two major publishers involved. Small firms could not afford to undertake protracted litigation against such corporations on a contingent fee basis, nor could petitioner afford to pay them by the hour for such litigation.

Respondents had the complaint removed to U.S. District Court for the District of Columbia and moved for dismissal of defendant Klavins for lack of personal jurisdiction. The district court dismissed defendant Klavins.

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[1] Dr. Polsby initially learned of respondents' story the week it appeared in *Good Housekeeping* magazine. She was called by an NIH acquaintance whose daughter had read it. The daughter told her mother that Dr. Polsby's story had appeared in *Good Housekeeping*.

The dismissal of defendant Klavins is not addressed by this petition.

The remaining defendants moved for dismissal because of the outcome of the trial in *Polsby v. Shalala*. Dr. Polsby had lost the case largely because the district judge said she did not believe the sexual harrassment had occurred. Respondents made the argument that because it had been "proved" in court that Dr. Chase had not made a "pass" at Dr. Polsby, respondents had not stolen her story. In their brief, respondents referred to Dr. Polsby's allegations regarding her experiences at NIH as a second work of fiction. Respondents' briefs in district court were extremely nasty and laced with numerous pejorative statements about Dr. Polsby, apparently designed to bias the district court judge against her. Respondents' district court briefs substituted pejoratives about Dr. Polsby for legal argument. However, in respondents' counsels' direct dealings with Dr. Polsby, they were extremely nice to her.

Beyond the above argument, and the profuse pejorative statements about Dr. Polsby, respondents' briefs in district court contained nothing other than denials that their story was based on her. There were carefully worded affidavits from the author saying he had never met Dr. Polsby and from the artist saying he had employed a model for the drawing of Dr. Lord. There were comparisons between the two stories in which the differences were emphasized and the similarities ignored. Respondents did not provide any argument in support of the notion that if they did take the story of Dr. Polsby's experiences at NIH, and fictionalized it in such a way that she was still clearly recognizable as her and only her, and commercially exploited the story in such a way as to deprive Dr. Polsby of her property rights in her own story, that they were entitled to do so.

After respondents filed their motion to dismiss or for summary judgment, Dr. Polsby took the position that they

should suffer the consequences of having made the argument that her allegations against NIH were fictional. If Dr. Polsby's story of what happened to her at NIH was claimed by respondents to be a work of fiction, then that story qualifies as the product of Dr. Polsby's imagination and is therefore her intellectual property, regardless. Because she had recorded her story several years before respondents published their novel, respondents, in publishing her story, infringed her copyright.

Dr. Polsby was still within the limitations period for copyright infringement claims and filed a copyright infringement suit. She filed the complaint in U.S. District Court for the Southern District of New York, because she had jurisdiction in New York over all defendants including St. Martin's Press. She had asked the defendants, all four of which are represented by the same counsel, if they would agree to join the case with the instant case, but they refused. In addition to her New York case, Dr. Polsby filed a motion in the instant case to amend the complaint to add the copyright infringement claims against the remaining two defendants.

The district court judge denied Dr. Polsby's motion for leave to amend her complaint, granted respondents' motion to dismiss or for summary judgment, did not allow any discovery, and ordered the case dismissed. His opinion contained largely *sua sponte* reasoning, to which, therefore, Dr. Polsby had not had any opportunity to respond.

The lengthy opinion seemed so one-sided that Dr. Polsby wondered if it had been written in anger because of her other litigation. Perhaps respondents' pejorative statements about Dr. Polsby had had their desired effect. The fact that Dr. Polsby was a *pro se* plaintiff may also have caused the judge to be biased against her, although the original complaint had been drafted by a major law firm with expertise in intellectual property law. In any event, there was little in the way of language to indicate that the judge had weighed both sides of the case. There

were also numerous factual inaccuracies in the judge's opinion which were disadvantageous to Dr. Polsby. These were mostly minor but seemed intentional and betrayed an apparent desire on the part of the judge to rule against Dr. Polsby.

In the opinion the court improperly and admittedly focused on a comparison of the two stories and the judge's beliefs about whether respondents had based their story on Dr. Polsby. See App. *infra*, 4a.

> "Because the central issue presented in this motion is the nature and extent of the similarities between the life of the plaintiff and the heroine's life in My Soul To Take and in the Good Housekeeping article, the Court will carefully review and compare the plaintiff's account of her experiences with the story in the book and the article in order to resolve these motions."

This was completely inappropriate in a Fed. R. Civ. P., Rule 12(b)(6) and Rule 56 motion to dismiss or for summary judgment, and in a case in which Dr. Polsby was entitled to a jury to decide whether the similarities proved that respondents had based their story on Dr. Polsby. The judge then proceeded to discount the similarities between the two stories and emphasize the differences. He describes Dr. Polsby's story and then describes that of respondents, omitting from his account of respondents' story the most salient similarities of Dr. Lord to Dr. Polsby. At one point the judge concludes: "The primary similarities between the plaintiff and Dr. Lord are limited to the fact that they are both women, and that they both worked for NIH." See App., *infra*, 12a.

Unaccountably, the judge ignores the fact that Dr. Polsby and Dr. Lord are both physicians in almost identical specialties, that they worked in the same institute, whereas NIH is comprised of more than a dozen institutes, that their careers were both ruined by denial of credit for

a three-year residency, whereas very few physicians do residencies at NIH, that they were both treated badly because they turned down their mentor's sexual advances in a one-time encounter at the beginning of their stories, that their principal supporting character is a former NIH patient with almost the same name (Duggan versus Dugan), and that both stories consist of a David and Goliath situation in which both women, with Mr. Duggan/Dugan's help, are fighting against the government medical establishment to expose defective or fraudulent research.

There are numerous other similarities in details such as the description of Dr. Chase/Lancaster's house and the fact that both Dr. Polsby and Dr. Lord are interested in art and paint as a hobby. (Dr. Polsby was an art major in college.) There are also more subtle but important similarities, such as the similar personalities of the two women. Moreover, the district court opinion did not address Dr. Polsby's claim of the unauthorized use of her image.

After spending the bulk of his opinion improperly deciding for himself whether respondents had based their story on Dr. Polsby, the district judge then gives three reasons why Dr. Polsby's claims must fail. See App., *infra*, 9a:

> "First the defendants did not receive any commercial benefit solely from the use of her name or likeness. Second, there is no evidence that the defendants even used her name or likeness in the novel or article. Third, she has no right to her life story because she became a public figure and the information became part of the public domain when she voluntarily testified before Congress regarding her experiences at the NIH and her testimony was broadcast on C-SPAN and CNN."

None of these three arguments were made by respondents in their briefs excepting the denials of having based their story on Dr. Polsby.

First, the judge seems to think that as long as the respondents made some efforts of their own in adapting Dr. Polsby's story for their commercial benefit, they were entitled to misappropriate her story. He cites no authority for the claim that the defendants had to derive commercial benefit *solely* from the use of her *name* or *likeness*. In Dr. Polsby's view, when respondents derived commercial benefit from an unauthorized use of her identity, they infringed her rights and misappropriated her property.

Dr. Polsby's position is that if respondents' story is so similar to hers that it could not have been independently created, and if respondents' story is so similar to hers that it deprives Dr. Polsby of the ability to market the same story herself, i.e. deprives her of her property interest in the story of her experiences, then respondents have infringed her rights. Stealing is stealing, whether or not respondents have put window-dressing on the stolen property.

The second reason the district judge gives for dismissing Dr. Polsby's case is that ". . . there is no evidence that the defendants even used her name or likeness in the novel or article."

This point has already been discussed. The merits of Dr. Polsby's claims had no place in a court's decision on a motion to dismiss or for summary judgment under Fed. R. Civ. P., Rules 12(b)(6) and 56.

The district court's third reason for dismissing Dr. Polsby's case is its finding that she is a public figure. Dr. Polsby disputes the notion that accepting an invitation to testify before Congress makes that person a public figure in the same sense that politicians and entertainers are public figures. She concedes that the public's interest and right to know facts supersedes her property interest in her story. That does not mean that anyone has the right to fictionalize her story and commercially exploit it for its entertainment value, and misappropriate what has become

generally recognized in our society as a property interest in a story that has come to the public's attention, i.e., as the right to sell one's story.

Moreover, the principal claim in this case is that of right of publicity. Although private persons are considered to also possess the right of publicity, a public figure has a stronger claim to that right. A public figure can more easily demonstrate the property value inherent in his or her identity. The district court finding that Dr. Polsby is a public figure would have the effect of strengthening rather than diminishing her claims to her right of publicity, i.e. her right to realize the commercial value of her identity.

REASONS FOR GRANTING THE PETITION

I. SUMMARY AFFIRMANCE PROCEDURES IN THE D.C. CIRCUIT, AS EXEMPLIFIED BY THEIR APPLICATION IN THE INSTANT CASE, DENY APPELLANTS DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE LAW, ARE IN VIOLATION OF THE INTENT OF THE STATUTE WHICH CREATED THE FEDERAL CIRCUIT COURTS OF APPEAL, AND CONFLICT WITH PRACTICES IN OTHER CIRCUITS. THIS COURT SHOULD PROVIDE GUIDANCE TO THE CIRCUITS AS TO WHAT CASES AND PROCEDURES ARE APPROPRIATE FOR SUMMARY AFFIRMANCE.

The role and duties of the federal circuit courts of appeal have been established by statute. The federal circuit courts of appeal do not have discretionary review. See 26 Stat. 826 (1891). See also *McLish v. Roff*, 141 U.S. 661, 666, and *In Re Woods*, 143 U.S. 202: ". . . the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice."

There is little case law with respect to the legal validity of the manner in which district court cases are being summarily affirmed by the D.C. Circuit. The D.C. Circuit is not likely to criticize its own procedures, and this Court has not yet granted review of any case in which a petitioner has questioned summary affirmance procedures in the D.C. Circuit.

The only case petitioner has been able to locate with respect to the validity of the D.C. Circuit's summary affirmance procedures is the case of *United States v. Glover*, 731 F.2d 41 (1984). In that case, a member of a three-judge panel, Judge Abner Mikva, filed a dissenting opinion to a decision to grant summary affirmance. He stated: "It is not necessary to tarry on the merits of this case. My concerns address the procedure used by this court in rendering a decision on the merits."

Judge Mikva then describes the D.C. Circuit's summary affirmance procedure. He states: ". . . when this court reviews a motion for summary affirmance, the procedure is indeed summary." He mentions the briefs that were filed in the case and continues:

> The papers were then referred to the motions panel. That panel, which convenes once a week, consists of three judges . . . , only two of whom physically meet to review the motions. At these meetings, held *in camera*, as many as ten or fifteen motions can be decided in one or two hours. Only if the two judges in attendance disagree . . . are the papers presented to the third "tie-breaker" judge.

He concludes:

> "My dissent stems from a firm conviction that when this court summarily decides the merits of a case through the procedure described above, its actions undermine the integrity and general principles of the appellate process. The hastened nature of a summary affirmance belies every vestige of an appeal. . . ."

* * * *

> Long tradition in the appellate courts of this country and of England has established the manner in which an appeal is treated. In sum, anything that looks so little like an appeal, contains so little of the accoutrements of an appeal, involves so little of the collegiality of an appeal, ought not to be considered an appeal. Whatever was done to the appellant in this case, he did not get an appeal from the decision of the trial judge. . .

Judge Mikva acknowledges that there might be some "proper occasions for a summary procedure," but he deplores the lack of guidelines to delineate what those occasions are.

All the circuits allow for summary affirmance, but only a few allow the appellee to file a motion for summary affirmance and/or preclude the appellant from filing a proper appeal brief. This Court should provide guidance to the circuits as to what cases and what procedures are appropriate for summary affirmance. The Court must do this in order to prevent the arbitrary denial of due process of law that Dr. Polsby asserts occurred in her case.

Dr. Polsby has included in the appendix a list of issues she might have raised, had she been allowed to raise issues on appeal and make her arguments in a proper appeal brief. (App., *infra*, 33a-34a).

II. THIS CASE WAS INAPPROPRIATE FOR SUMMARY AFFIRMANCE BECAUSE IT IS A CASE OF FIRST IMPRESSION FOR THE CIRCUIT, INVOLVING THE NEWLY-RECOGNIZED RIGHT OF PUBLICITY, AND IS A COMPLEX CASE IN A HIGHLY SPECIALIZED AND RAPIDLY-EVOLVING AREA OF LAW.

This case was inappropriate for summary affirmance for several reasons. Most importantly, this is a case of first impression for the D.C. Circuit. One of the principal causes of action in this case was infringement of Dr. Polsby's right of publicity. The D.C. Circuit has never

before considered a right of publicity case. *The Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit states*: "Parties should avoid requesting summary disposition of issues of first impression for the Court." (See Handbook p. 66, VIII.G., Motions for Summary Disposition.)

Further, in the D.C. Circuit there is only one other published opinion at the district court level which concerns the right of publicity, the case of *Lane v. Random House, Inc.*, 23 Media L. Rep. (BNA) 1385, (D.D.C. 1995). The defendants in *Lane*, who prevailed in that case, were represented by the same attorneys as the defendants in the instant case. Although there are numerous right of publicity cases in New York, which is the center of the publishing industry, and California, which is the center of the motion picture industry, *Lane* and *Polsby* are the only right of publicity cases in the District of Columbia, even at the district court level.

Moreover, the right of publicity is a newly-recognized and rapidly evolving tort claim in an area of the law that is highly specialized. For that reason alone, even if this were not a case of first impression for the D.C. Circuit, this case would have been inappropriate for summary affirmance.

III. COURTS MUST RECOGNIZE A PROPERTY INTEREST COMMONLY RECOGNIZED BY OUR SOCIETY: THAT AN INDIVIDUAL. WHETHER A PUBLIC FIGURE OR NOT, OWNS THE COMMERCIAL VALUE OF HIS OR HER IDENTITY, INCLUDING THE INDIVIDUAL'S PERSONA, IMAGE OR LIFE EXPERIENCES AS DEPICTED IN A WORK OF FICTION WHICH IS MARKETED FOR ITS ENTERTAINMENT VALUE

McCarthy defines the right of publicity as "the inherent right of every human being to control the commercial use of his or her identity" and states that the right of publicity

is "properly categorized as a form of intellectual property." [2] The first case to ever consider an individual's right of publicity is generally acknowledged to be the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953). Since *Haelan* in 1953, the concept of an individual's right of publicity has epanded from the use of an individual's name or image to include an individual's persona and other elements associated with that individual. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 821 (6th Cir. 1983). The concept of right of publicity also includes the right of an individual to prevent fictionalization of his or her own life story. See *Warren E. Spahn v. Julian Messner, Inc. et al.*, 250 N.Y.S.2d 529 (1964).

As noted above, the first case to recognize the right of publicity was *Haelan* (supra) in 1953. Respondents listed the *Restatement (Second) of Torts* § 652C (1977) in the table of authorities of their motion. Respondents relied on this restatement, as did many of the cases they cited, with respect to the right of publicity. The district court in its opinion on this case also relied on this restatement. However, the current restatement of the law of the right of publicity is the *Restatement of the Law (Third) of Unfair Competition* § 46 (1995).

Respondents' motion cited only one case which is at all factually similar to the instant case, *Polydoros v. Twentieth Century Fox Film Corp.*, 948 P.2d 409, 69 Cal. Rptr. 2d 897 (Cal. Nov. 19, 1997) (No. 5064868). Respondents failed to inform the district court that the California Supreme Court recently granted Polydoros' petition for a *writ of certiorari* and will be reviewing the *Polydoros* decision. The case has been discussed on National Public Radio as a case which will decide the extent to which a fictional character can be based on a real person without that person's permission.

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[2] McCarthy, *McCarthy on Trademarks*, § 28.01[1] (June, 1996 rev.).

The plaintiff in *Polydoros* sued for invasion of privacy, negligence, and defamation because a character in a movie was based on him. In petitioner's case, the principal character in the novel was based on her. Petitioner had earlier been told by a number of persons that the story of what happened to her at NIH is so interesting that she should sell the rights to her story. Even if Polydoros should lose his appeal, the precedent would not apply to Dr. Polsby's right of publicity claims. Dr. Polsby's persona and story had an independent market value, as demonstrated by respondents' use of it. Dr. Polsby can not now market her story for commercial purposes because the same story has already been published by respondents. It is doubtful that Polydoros' character and/or personal story had an independent market value, and he did not sue for right of publicity.

The right of publicity has become well recognized in our society. Persons such as Dr. Polsby are routinely paid for the commercial use of their stories. See *Smith Buys Rights To Slashing Story, Chattanooga Free Press,* December 6, 1997 (Lodged Materials 5). Tort law evolves according to the norms of society. Modern society has come to recognize that individuals such as Dr. Polsby have a property interest in the rights to their stories. Courts must recognize such property interests and rights at common law.

IV. ACCEPTING AN INVITATION TO TESTIFY BEFORE CONGRESS DOES NOT MAKE AN INDIVIDUAL A PUBLIC FIGURE IN THE SAME SENSE THAT POLITICIANS AND ENTERTAINERS ARE PUBLIC FIGURES, NOR DOES READING A PREPARED STATEMENT IN PUBLIC PUT THAT STATEMENT IN THE PUBLIC DOMAIN.

The district judge in this case made a number of errors of fact and of law which should have resulted in reversal. The summary affirmance procedure in the circuit caused these district court errors to be overlooked. For example, the district court spent the bulk of his lengthy published

opinion discussing whether respondents' novel was based on Dr. Polsby. This was inappropriate, prior to discovery, on a motion under Fed. R. Civ. P., Rules 12(b)(6) and 56, and in a case in which Dr. Polsby was entitled to a jury trial.

The judge emphasized the differences between the two stories and ignored similarities which made it clear respondents had taken Dr. Polsby's story. As Judge Learned Hand observed with respect to copyright law, "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." See *Sheldon et al. v. Metro-Goldwyn Pictures Corporation et al.*, 81 F.2d 49 (2nd Cir. 1936).

According to the *Restatement of the Law, Third, Unfair Competition*, American Law Institute, 1995, Chapter 4, Appropriation of Trade Values, Topic 3, Right of Publicity, citing the case of *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), "Whether the plaintiff is identified by the defendant's use is a question of fact." Thus, whether respondents appropriated Dr. Polsby's story is a genuine issue of material fact to be decided at trial by a jury. The district court erred in spending the bulk of its opinion deciding this for itself and dismissing the case on the basis of Rule 56, when material facts were at issue.

The district court gave three reasons for its decision that Dr. Polsby's claims of infringement of her right of publicity must fail:

> The plaintiff's claims for misapproriation and infringement of the right to publicity must fail for three reasons. First, the defendants did not receive any commercial benefit solely from the use of her name or likeness. Second, there is no evidence that the defendants even used her name or likeness in the novel or article. Third, she has no right to her life story because she became a public figure and the information became part of the public domain when she voluntarily testified before Congress regarding her experiences at the NIH and her testimony was broadcast on C-SPAN and CNN.

This summary of its opinion shows numerous errors in the district courts's reasoning. First, the district court apparently restricted its definition of right of publicity to the use of name and likeness, whereas, it is now generally recognized that the right of publicity extends to other indicia of identity, such as an individual's persona and life story. Further, whereas the district court erroneously restricted its definition of right of publicity to use of name or likeness, the court then proceeded to completely ignore respondents' unauthorized use of Dr. Polsby's likeness.

The district court also states that respondents "did not receive any commercial benefit *solely* from the use of her name or likeness." (emphasis added). Dr. Polsby again would like to call the Court's attention to the reasoning of Judge Learned Hand in *Sheldon*, supra, "No plagiarist can excuse the wrong by showing how much of his work he did not pirate."

The district court went on to state, "the mere fact that the novel was published and the defendants intended to make a profit from this publication is not enough to constitute commercial benefits." The district court cited no authority for such a statement. Here's Johnny Portable Toilets, Inc. did not receive commercial benefit solely from the use of Johnny Carson's name or likeness. (After all, they manufactured the toilets themselves and distributed them.) Moreover, it is difficult to understand how the district court could think that the publication of a novel for profit does not constitute commercial benefit.

The District Court goes on to state, "there is no evidence that the defendants even used her name or likeness in the novel and article." Here, the District Court inappropriately decides an issue of fact and again restricts the definition of right of publicity to the use of name or likeness.

The third reason the District Court gave for ruling against Appellant actually strengthen Dr. Polsby's claims. Although it is now generally recognized that a right of

publicity can also accrue to persons who are not public figures, the right of publicity is a right that most commonly acrues to public figures. The district court's ruling that Dr. Polsby is a public figure strengthens her right of publicity claims.

However, for the district court to say that Dr. Polsby became a public figure because she accepted an invitation to testify before Congress and that because she read a prepared statement about her case in public, the contents therefore became part of the public domain, is like saying that if someone reads a poem she has written in public, her poem becomes part of the public domain.

Appellant does not, in fact, contend that her case is not part of the public domain for purposes of its newsworthiness. She only contends that the commercial use of her story for profit, and for its entertainment value, belongs to her.

CONCLUSION

Petitioner Dr. Polsby wrote this petition entirely on her own. No one other than Dr. Polsby even read the petition prior to its submission. Although Dr. Polsby has learned some things in all her years of litigation, she is not a lawyer. She is representing herself because the odds are low of a given petition being granted, and because the cost of professional legal help is so high. However, should this petition be granted, petitioner will then do her best to obtain high quality professional representation in order to brief the Court with competency in this highly specialized area of the law, and in order to be represented properly at oral argument.

The questions raised in this petition are extremely important. They concern the fundamental right to an appeal of a district court decision. Summary affirmance of a flawed decision in district court, in this complex case of first impression in the circuit, was not proper. The fact

that summary affirmance was granted in this case is evidence of something seriously wrong with procedures and practices in the D.C. Circuit. The Court must protect the right to an appeal and the rights of every citizen to receive equal and fair treatment in the courts. Therefore, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

[Filed Mar. 11, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7148

M. MAUREEN POLSBY, M.D.,
Appellant

v.

STEVEN G. SPRUILL, *et al.*,
Appellees

BEFORE: Williams, Sentelle, and Henderson, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted substantially for the reasons stated in the district court's order filed February 12, 1997, and the court's memorandum opinion filed August 1, 1997. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

/s/ SFW

/s/ DBS

/s/ KLH

[Filed Aug. 1, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 96-1641 (TFH)

M. MAUREEN POLSBY, M.D.,
Plaintiff,

v.

STEVEN G. SPRUILL, *et al.*,
Defendants.

MEMORANDUM OPINION

Pending before the Court are the Plaintiff's Motion for Leave to File an Amended Complaint, and the Defendants' Motion to Dismiss and/or for Summary Judgment made pursuant to Fed. R. Civ. P. 12(b)(6) and 56. For the reasons set forth below, the Court will deny the plaintiff's motion to file an amended complaint and grant the defendants' motion and enter summary judgment for the defendants on all counts of the Complaint.

BACKGROUND

This case is based on the plaintiff's allegations that defendant Spruill's book, *My Soul To Take*, is based on the plaintiff's life story. She claims that the life of the novel's main character, Dr. Lord, parallels her own to such an extent that it infringes on her right to publicity, constitutes misappropriation of her name or likeness, negligently and maliciously shows her in a false light, constitutes negligent and malicious defamation, and results in the intentional infliction of emotional distress. The plaintiff first filed this suit in December 1994 in the

United States District Court for the District of Columbia based on a book written by the defendant Spruill and on an article in *Good Housekeeping* which was a shortened version of the book, printed by the defendant Hearst. Thereafter, the case was delayed for a number of reasons. First, in September 1995, a stipulation of dismissal without prejudice and a tolling agreement were entered into between the plaintiff and the defendants, allowing the plaintiff to re-file the Complaint by March 19, 1996. On March 18, 1996, the plaintiff, with new counsel, refiled the Complaint in D.C. Superior Court,[1] but did not serve the defendants immediately. The case was dismissed for failure to timely serve defendants under D.C. Superior Court Rule 4(m). Plaintiff received an order to vacate the dismissal and served the defendants with the complaint. The defendants then filed a Notice of Removal to this Court on July 15, 1996, based on diversity of citizenship.

The complaint which is now before the Court contains four counts against the two defendants and ten counts against defendant Spruill individually. Counts I and II are Infringement of the Right of Publicity by defendants Spruill and Hearst for the article and the book. Counts III and IV are Misappropriation of Dr. Polsby's Likeness, Persona, and Image by defendants Spruill and Hearst for the article and the book. Count V is Negligent False Light by defendant Spruill and Count VI is Malicious False Light by defendant Spruill. Both are based on the fact that the character in the book breaks into two houses and one office and that the plaintiff never did this. Counts VII and VIII are Negligent and Malicious Defamation by defendant Spruill based on the illegal breaking and entering by the character in the book. Counts IX and X are Negligent and Malicious False Light by defendant Spruill based on the fact that the character in the book

[1] The plaintiff's new counsel sought and was granted withdrawal from the suit on August 8, 1996, and the plaintiff filed a notice of intention to proceed *pro se* on August 14, 1996.

has a romantic relationship with a patient, an act the plaintiff claims is unethical and that she never did. Counts XI and XII are Negligent and Malicious Defamation by defendant Spruill based on the fact that a relationship between a doctor and a patient is unethical. Counts XIII and XIV are Intentional Infliction of Emotional Distress based on the fact that the character in the book had a romantic relationship with a patient and broke into two houses and an office.

The defendants filed the present motion claiming that the plaintiff fails to state a claim upon which relief can be granted, and therefore the case must be dismissed under Fed. R. Civ. P. 12(b)(6). In the alternative, defendants argue that they have provided sufficient evidence to demonstrate that there are no issues of material fact in question and, thus, they are entitled to summary judgment under Fed. R. Civ. P. 56. Because the central issue presented in this motion is the nature and extent of the similarities between the life of the plaintiff and the heroine's life in *My Soul To Take* and in the *Good Housekeeping* article, the Court will carefully review and compare the plaintiff's account of her experiences with the story in the book and the article in order to resolve these motions.

According to the plaintiff, the following is an account of the events in her life that were misappropriated by the defendants. In 1982, the plaintiff was offered a fellowship by Dr. Thomas Chase, the Scientific Director of the National Institute of Neurological and Communicative Disorders and Strokes ("NINCDS"), an institute of the National Institute of Health ("NIH"). At the time, the plaintiff was a neurology resident at the New England Medical Center of Tufts University in Boston. The plaintiff's job was to be the research assistant of Dr. Chase. The plaintiff was told by Dr. Chase that the fellowship was for at least two years, and for a third if the plaintiff wished. This fellowship was very prestigious due to its connection with the NIH and served as a stepping stone

to academic neurology. In 1983 the plaintiff left Tufts with three months left in her residency based on assurances from Dr. Chase that her time at the NIH would serve as credit towards the completion of her residency.

At some time after the plaintiff had accepted the fellowship, but before she actually started work at the NIH, the plaintiff encountered Dr. Chase at a conference in San Diego. According to the plaintiff, at this conference, Dr. Chase got the plaintiff into his hotel room on a pretext, held her by her shoulders, pushed her down onto the bed, put his arms around her and kissed her. He invited her to accompany him to Mexico for the week instead of attending the meeting. The plaintiff resisted the sexual advances and requested that their relationship be kept on a professional level and then left the room.

According to the plaintiff, she was willing to forget the incident occurred, but Dr. Chase was not. Though he never made another advance towards her, the plaintiff states that once she arrived at the NIH, she was treated significantly differently than the male fellows. The plaintiff repeatedly states that she found Dr. Chase to be arrogant, driven and impatient, despite having a "patrician air" about him. These words, according to the plaintiff, are similar to those used by the defendant Spruill to describe Dr. Lancaster, a character in his book. The plaintiff also claims that she found out later that Dr. Chase had a reputation as a womanizer and that many thought she had only been hired because Dr. Chase was attracted to her, as she was the first female medical staff fellow ever hired by Dr. Chase. The plaintiff also points out that she attended several staff parties at Dr. Chase's home and that his house was located at the end of a long driveway off of an isolated, winding country road. According to the plaintiff, this description is similar to the one used by the defendant when he described the location of the home of the character in the book who is alleged to be the counterpart to Dr. Chase.

Despite her problems with Dr. Chase, the plaintiff was able to perform research on the connection between clinical depression and various neurological ailments like Parkinson's disease and spasmodic torticollis (a disorder similar to Parkinson's). Dr. Polsby's hypothesis was that there was a connection between the pathophysiology of movement disorders and manic depression and she demonstrated that those with spasmodic torticollis could be treated with antidepressants. She created a pilot study for patients with spasmodic torticollis. After ten months of work, the plaintiff claims that Dr. Chase took over the study and that articles about the research failed to mention the plaintiff's involvement.

At the end of her two years, the plaintiff was not allowed to renew her fellowship for the third year, as had been assured by Dr. Chase. She was also not given the necessary credit towards her residency and, therefore, she could not get a residency or research position anywhere. The plaintiff claims this is due to the power and prestige of the NIH and that her career in neurology and research was over. The plaintiff was not eligible to take the examination to become a Board-certified neurologist because she had not finished her residency. Currently, the plaintiff is a disability claims examiner for the Social Security Administration.

Several years after the plaintiff left the NIH, she was contacted by Richard Duggan, one of the patients in her pilot study. Mr. Duggan had read an article describing the pilot study in a scientific journal. The plaintiff had been listed as a minor author of the article, apparently without her knowledge. Mr. Duggan notified the plaintiff because there were items in the article about the study that Mr. Duggan believed to be false, including the number of patients involved in the study, and the types of tests the patients had undergone. Mr. Duggan had contacted other members of the study and they supported his recollections. The plaintiff attempted to report this apparent fraud to the NIH and others in the government,

but was not satisfied with the response, and so, according to the plaintiff, she filed her initial Title VII lawsuit in order to get relief.

According to the defendants, and based on the Court's reading of the book and article in question, the following is an outline of the plot of *My Soul To Take* and the story that was printed in *Good Housekeeping*. In 1998, Dr. Lord, the main character, is a lab assistant at the NIH, participating in a research project studying the brain's code for vision. While working on this project, Dr. Lord assists in the surgeries of fifty blind volunteers who receive a microchip that gives them sight. Unfortunately, one evening while she is in the lab her supervisor, Dr. Lancaster, makes an unwanted sexual advance towards her. She is then fired. Dr. Lancaster refuses to provide a recommendation for her to enter a neurosurgery program, but she does become a successful general surgeon. Five years later, Dr. Lord encounters Andrew Dugan, one of the volunteers from the NIH vision project, and learns of a dangerous side effect of the microchip. It gives people the power to see the future, a power which horrifies many of the microchip recipients but which also draws the interest of a rogue section of the CIA that sees many uses for the microchip. In the course of trying to help past recipients of the microchip, including Andrew Dugan, Dr. Lord breaks into a psychiatrist's office and Andrew Dugan's home. She is almost killed at the Pentagon Athletic Center by a group of rogue CIA agents who want the secret of the microchip for themselves, and is also run off the road, thrown into the polar bear den at the National Zoo and forced to set an operating room on fire to avoid being the unwilling recipient of her own microchip. Ultimately, Dr. Lord tells her story to the Secretary of Defense and prevent FDA approval of the microchip, as well as stop the rogue CIA agents.

DISCUSSION

In order to resolve the defendant's motion, the Court must look beyond the attorneys' filings to affidavits and the actual book and article in question. Therefore, the Court will treat the defendant's motion as one for summary judgment. Fed. R. Civ. P. 56. Summary judgment is appropriate only if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In considering a motion for summary judgment, the Court may consider factual evidence outside the pleadings, but must draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Bayer v. United States Department of Treasury*, 965 F.2d 330, 333 (D.C. Cir. 1992). Material facts are facts that might affect the outcome of the suit under the governing law and are in dispute if a "reasonable jury" could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248.

1. Right to Publicity and Misappropriation [2]

Counts I, II, III and IV allege that defendants Spruill and Hearst infringed on the plaintiff's right of publicity and engaged in misappropriation.

Claims of infringement of the right to publicity and misappropriation are "indistinguishable as a legal matter" and should be treated as a single cause of action for misappropriation. *Lane v. Random House, Inc.*, 23 Media L. Rep. (BNA) 1385, 1387 (D.D.C. 1995). In order to prove the defendants engaged either in infringement of

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[2] In the complaint, the plaintiff has listed separate counts first concerning the book and then the article. However, the article was taken from the book and the only difference between the two is the removal of two subplots in order to shorten the article. Therefore, the Court will treat the book and the article as one entity with regard to the various counts of the Complaint.

the right to publicity or misappropriation, the evidence must show that the defendants used the plaintiff's name or likeness for a character portrayed in his fictional work and that they derived commercial benefit from the identity of the plaintiff, the public interest in the plaintiff or from any other value associated with the plaintiff's name or likeness. *See* Restatement (Second) of Torts § 652C (1977); *Lane*, 23 Media L. Rep. (BNA) at 1387). The plaintiff must demonstrate that her name or likeness was used for the value associated with it, that she can be identified from the publication, that the defendants received a benefit from the use of the name or likeness, and that it wasn't used incidentally or for newsworthy purposes. *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994). However, the mere fact that the novel was published and the defendants intended to make a profit from this publication is not enough to constitute commercial benefit. *Lane*, 23 Media L. Rep. (BNA) at 1388 (quoting Restatement 2d of Torts § 652C cmt. d.). It must be the case that the defendants used the name or likeness for the express purpose of appropriating the commercial benefit that is particularly associated with the name or likeness of the plaintiff. Restatement 2d of Torts § 652C cmt. d.

The plaintiff's claims for misappropriation and infringement of the right to publicity must fail for three reasons. First, the defendants did not receive any commercial benefit solely from the use of her name or likeness. Second, there is no evidence that the defendants even used her name or likeness in the novel or article. Third, she has no right to her life story because she became a public figure and the information became part of the public domain when she voluntarily testified before Congress regarding her experiences at the NIH and her testimony was broadcast on C-SPAN and CNN.

The defendants received no commercial benefit from any similarities that may exist between the plaintiff and

Dr. Lord. As explained above, the mere fact that the novel was published and the defendants intended to make a profit from this publication is not enough to constitute commercial benefit. Instead, it must be the case that the defendants used the name or likeness of the plaintiff for the express purpose of appropriating the commercial benefit that is associated with the name or likeness of the plaintiff. No evidence has been submitted to the Court that could lead the Court to the conclusion that there was any legally cognizable commercial benefit particularly associated with the name or likeness of the plaintiff.

The Court is not convinced that the defendants, in fact, used the plaintiff's "name or likeness," another necessary element for the torts of misappropriation and infringement of the right to publicity. *Lane v. Random House, Inc.*, 23 Media L. Rep. (BNA) 1385, 1387 (D.D.C. 1995); Restatement (Second) of Torts § 652C (1977). The plaintiff claims that there are numerous similarities between her life and the life of the protagonist in the novel that are sufficient to establish that the novel is based on her life story. These similarities include that they were both subject to, and rejected, unwanted sexual advances by their supervisors, that they were both females working at the NIH as fellows in the field of neurology and that they both suffered professionally as a result of their rejection of their supervisors. The plaintiff also claims that she found Dr. Chase to be arrogant, driven, and impatient, despite having a "patrician air" about him. This description, she argues, is similar to that of Dr. Lancaster's home in *My Soul to Take*. The plaintiff further points out that similar to Dr. Lancaster's home in *My Soul to Take*, Dr. Chase's house was located at the end of a long driveway off an isolated, winding country road. The plaintiff finally claims that like Dr. Lord, the plaintiff paints as a hobby. Finally, the last similarity between Dr. Polsby's life and the story in *My Soul to Take* is that the plaintiff was allegedly contacted by Richard Duggan, one

of the patients in her pilot study while Dr. Lord meets an Andrew Dugan who is one of the original fifty recipients of the microchip.

Despite these few likenesses, as is made clear through the affidavits and a reading of the book and article, there are many more differences than similarities. For example, the plaintiff was a medical staff fellow in the field of neurology working on a connection between movement disorders and depression. The character in the book, Dr. Lord, is described as a lab assistant, though she was training to become a neurosurgeon. In contrast to the plaintiff, Dr. Lord was working on a breakthrough new project involving the deciphering of the brain's code for vision. In addition, it is quite clear in the book that Dr. Lord was the victim of an unwanted sexual advance, while the same is not necessarily true for the plaintiff. In a previous lawsuit, the plaintiff was unable to prove that the alleged advance ever took place. In fact, the judge in that case found that the plaintiff had fabricated the entire story.[3] Additionally, in the plaintiff's situation,

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[3] In 1988, the plaintiff filed a Title VII suit against the Department of Health and Human Services claiming gender discrimination and mistreatment during her fellowship at the National Institute of Health (NIH). She claimed that her mistreatment was the result of her complaining of the unwanted sexual abvance by Dr. Chase. That suit endured through many procedural difficulties and was finally heard before Judge Deborah Chasanow in Maryland. On March 28, 1996, after a bench trial, Judge Chasanow found that there was no merit to the plaintiff's claims that Dr. Chase sexually harassed her. Judge Chasanow wrote:

> "Plaintiff's account of her treatment by [her supervisor] at the conference in San Diego simply is fabricated. . . . Not for a moment do I find [plaintiff's] account credible. . . . All in all, I simply do not believe that [plaintiff's supervisor] made an unwelcome and inappropriate 'pass' at Dr. Polsby at that or any other time. Unfortunately, I believe that the incident was concocted in order to give spice to her later claims that [her supervisor] treated her differently than male fellows hired to do research [at NIH]."

Polsby v. Shalala, Civil Action No. DKC 88-2344, mem. op. at 7-8 (D. Md. Mar. 28, 1996).

the sexual advance, if it occurred, took place before she began her fellowship, and despite this alleged advance, she was allowed to complete her two years at the NIH. Dr. Lord was already working for Dr. Lancaster when he made a pass at her, and he only kept her on for as long as he needed her to complete the surgeries for his pilot study. She was fired after eight months, before the completion of her fellowship. The plaintiff was unable to qualify to take the necessary board exams and as such she is now working for the Social Security Administration. She allegedly received no help from her supervisor. Dr. Lord, in the book, received a recommendation from her supervisor that allowed her to pursue a successful career in general surgery. Dr. Lord never filed suit against Dr. Lancaster or the NIH. Also missing from the plaintiff's life are, among other things, rogue CIA agents who can see the future, a near death experience in the locker room at the Pentagon Athletic Center, an escape from the polar bear den at the National Zoo, and a car chase through Langley.

The primary similarities between the plaintiff and Dr. Lord are limited to the fact that they are both women, and that they both worked for the NIH. Even if the Court grants the plaintiff the benefit of the doubt and assumes for the purpose of this motion that there was some advance made by plaintiff's supervisor, the circumstances surrounding this event and those that occurred in the book are completely different. The plaintiff's allegedly took place in a hotel room at a medical conference prior to her beginning work at the NIH. She still completed a two year fellowship. In contrast, Dr. Lord was accosted in the lab at the NIH and was forced out after eight months.

The plaintiff also cannot prove that the novel is based on her life story because she has produced no evidence that the defendant knew her or knew about her prior to writing the outline of his novel. In her brief, the plaintiff is only able to speculate as to the possibility that the

defendant Spruill heard about her experience. There is no evidence that the defendant ever knew about the plaintiff or her experience. In fact, the defendant states in his affidavit that

> I do not know the plaintiff. . . . I have never met her, and I have never seen a picture of her. Before this lawsuit was filed, I had never heard of Dr. Polsby, never knew her medical background, never knew her employment history, and never knew she sued the NIH for sex discrimination. Before this lawsuit, I had never spoken to anyone about [the plaintiff] nor read any news articles about her.

Def. Spruill Aff. at 2-3. The plaintiff may not rely on allegations or denials of the defendants' motion, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c). There is no evidence that the defendant Spruill was ever aware of the plaintiff prior to this lawsuit. In fact, the defendant produced evidence in the form of date stamped computer printouts of two outlines defendant Spruill had written in preparation for the composing of this novel, that show he had the idea of the sexual advance and a majority of the rest of the facts that were allegedly taken from the life of the plaintiff before any accounts of the plaintiff were made public. Because the plaintiff has produced no contrary evidence, instead she merely speculates that defendant Spruill may have heard about her, it is clear to this Court that the defendant had come up with his plot and his characters before the plaintiff's story was ever made public.

Finally, plaintiff made her story public when she testified before Congress on June 25, 1992, prior to publication of the book or article. Her testimony described her alleged experience at the NIH and the alleged sexual advance by Dr. Chase and was broadcast on CNN and C-SPAN. "Liability for misappropriation also will not arise when the information in question is in the public

domain, for the public figure no longer has the right to control the dissemination of the information." *Matthews*, 15 F.3d at 440 (finding no misappropriation in the novel about the life of an undercover narcotics officer because the protection of one's name or likeness does not include one's life story). *See also Doe v. Roe*, 638 So. 2d 826, 829 (Ala. 1994) (finding that because the book in question in *Doe* was clearly a work of fiction, and was advertised as such, the plaintiff had no claim for misappropriation). As soon as the plaintiff told her story in a public setting, she made herself into a public figure, and the information became ripe for the fair use by others, even in a fictionalized form. *Id.* at 440-41 (citing *Douglass v. Hustler Magazine*, 769 F.2d 1128, 1139 (7th Cir. 1985)). *See also* W. Page Keeton, *et al., Prosser and Keeton on Torts*, § 177 at 853 (1984) ("Nor is there any liability [for misappropriation] when the plaintiff's character, occupation, and the general outline of his career, with many real incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one."). It is simply not enough for a claim of misappropriation and infringement of the right to publicity to show merely that a character in a novel is based on a real individual. *See Matthews*, 15 F.3d at 437.

For the foregoing reasons, the Court must grant summary judgment for the defendants on Counts I, II, III, and IV.

2. Negligent and Malicious False Light

Counts V, VI, IX and X allege that defendant Spruill is guilty of negligently and maliciously casting the plaintiff in a false light. In order to demonstrate that she has been cast in a false light, the plaintiff must show that the novel actually depicts her persona, does so falsely, that the depiction "would be highly offensive to a reasonable person, and [that the defendant] had knowledge of or acted in reckless disregard as to the falsity of the pub-

licized matter and the false light in which the [plaintiff] would be placed." *White v. Fraternal Order of Police*, 909 F.2d 512, 522 (D.C. Cir. 1990) (quoting Restatement 2d of Torts § 652E (1977)); *Matthews v. Wozencraft*, 15 F.3d at 432, 439 (5th Cir. 1994).

The plaintiff's claims for negligent and malicious false light fail for two reasons. First, as was demonstrated above, the plaintiff cannot show that the novel actually depicts her in any way. The Court will not repeat that discussion here. Second, assuming that the novel actually depicts the plaintiff, and does so falsely, the incidents in the novel that the plaintiff is concerned with do not meet the standard of "highly offensive to a reasonable person." *White v. Fraternal Order of Police*, 909 F.2d at 522. Nothing that Dr. Lord does would cause the plaintiff to lose any prestige or decrease her standing in her community. In fact, the exact opposite would probably be the case because the woman in the novel is a heroine. Nothing written in the book would meet the standard of being "highly offensive" to a reasonable person or in "reckless disregard" to the falsity of the publicized incident. *Id.* at 522.

There are two specific situations that occur in the novel that cause concern to the plaintiff. First are the two incidents of breaking and entering. Dr. Lord breaks into the office of the psychiatrist of one of the implant recipients who recently attempted suicide. Dr. Lord was trying to find the individuals' file in order to determine if the person had been having the same visions as Mr. Dugan, and whether the implant was to blame. Dr. Lord later breaks into Mr. Dugan's home because she fears that he has been abducted or harmed by the rogue CIA agents. She is trying to save his life. The second situation of note to the plaintiff is characterized by the plaintiff as an unethical doctor/patient relationship between Dr. Lord and Mr. Dugan. In *My Soul To Take*, the relationship between Dr. Lord and Mr. Dugan consists of two kisses. Additionally, in the book, Mr. Dugan was

never officially a patient of Dr. Lord's and, in any event, this relationship begins five years after Mr. Dugan received the implant when Dr. Lord is no longer involved in neurosurgery in any way.

It is clear that none of these activities would be highly offensive to a reasonable person. "It is only when there is such a major misrepresentation of his character, history activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in [Polsby's] position." *Lane v. Random House, Inc.* 23 Med. L. Rptr. 1385, 1390 (1995) (citing Restatement of Torts (Second) § 652E, cmt. c.). No reasonable jury could find that the incidents mentioned by the plaintiff would cast the plaintiff in a false light. Therefore, the Court will grant summary judgment for the defendants on Counts V, VI, IX, and X.

3. Negligent and Malicious Defamation

Counts VII, VIII, XI and XII allege that defendant Spruill is liable for negligently and maliciously defaming the plaintiff. In order for a statement to be defamatory towards the plaintiff, the statement must be shown to be "of and concerning" the plaintiff. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293-94 (D.C. Cir.) *cert. denied*, 488 U.S. 825 (1988). This is a factor in a claim for libel, but the same principle applies to a claim for defamation. *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983). It would, therefore, be impossible to find that the plaintiff was defamed by a statement made by the defendant if there is no evidence that the statement was even about the plaintiff. In addition, in order for a statement to be defamatory in general, the plaintiff must demonstrate that the statements made may be found to have a particular meaning and show that the meaning is defamatory. *See Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 670-711 (D.C. Cir. 1987). A statement has a defamatory meaning only when it is shown that the statement will injure the plaintiff in her

trade, profession, community standing, or will lower her in the estimation of the community. *Id.* at 670. The statements must make the plaintiff appear to be odious, infamous or ridiculous. *Fleming v. AT&T Info. Servs., Inc.*, 878 F.2d 1472, 1475-76 (D.C. Cir. 1989).

The key to the evaluation of a claim of defamation is to review the words or statements in their context, and not merely on their face. *Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir.), *cert. denied*, 115 S. Ct. 202 (1994). Assuming that the book is about the plaintiff, in Counts VII, VIII, XI and XII, she is again concerned with the defamatory effect of Dr. Lord breaking and entering as well as her relationship with Mr. Dugan. However, in the context of the plot, Dr. Lord's actions are acts of heroism and serve to make Dr. Lord a more courageous and admirable protagonist. Her goal in the two instances of breaking and entering is to save the lives of two people she knows and cares about. This would hardly cause plaintiff's reputation to be sullied. Dr. Lord's romantic feelings for Mr. Dugan are also not cause for concern. In the book, Mr. Dugan is not depicted as a past patient of Dr. Lord, and so the plaintiff's allegations that Dr. Lord had an unethical relationship with a patient is simply overstated. Since in *My Soul to Take*, Mr. Dugan is not, and was never, a patient of Dr. Lord, there simply is no defamatory effect to the plaintiff by placing Dr. Lord in a relationship with him.

Reviewing the actions of Dr. Lord in breaking into the psychiatrist's office and Andrew Dugan's home as well as her relationship with Andrew Dugan in the context of the entire story, and not merely on each's face, it is clear that these words or statements could not injure the plaintiff in her trade, profession, or community standing, or lower her in the estimation of the community. Therefore, the words or statements are not defamatory. In addition, because the plaintiff is unable to demonstrate that the novel is about her, nothing said in the book can be defamatory to her. Based on the facts of this case, no rea-

sonable jury could find that the defendant negligently or maliciously defamed the plaintiff. Therefore, the Court must grant summary judgment for the defendants on Counts VII, VIII, XI and XII.

4. Intentional Infliction of Emotional Distress

Counts XIII and XIV allege that defendant Spruill intentionally inflicted emotional distress on the plaintiff. For the plaintiff to prove that the defendant intentionally inflicted emotional distress on her, once again, she must prove that the novel is about her and her life. Beyond that, she must also prove that there was actual intent on the part of defendant Spruill to cause the plaintiff emotional harm through the writing of the novel. *See Waldon v. Covington*, 415 A.2d 1070, 1078 (D.C. 1980). This conduct by the defendant must be shown to be so outrageous in nature that it goes beyond the bounds of common decency. *Profitt v. District of Columbia*, 790 F. Supp. 304, 310 (D.D.C. 1991).

The plaintiff's claims for intentional infliction of emotional distress fail for three reasons. Yet again the plaintiff cannot succeed on this claim because there is insufficient evidence for a reasonable jury to conclude that the novel is about her. Second, it is also the case that even if the defendant did use some of the plaintiff's story in the writing of his novel, this conduct can hardly be described as outrageous in nature or going beyond the bounds of decency. Using a small piece of someone's life in the plot of a novel that is clearly fictional certainly does not qualify as outrageous conduct that goes beyond the bounds of common decency, especially when the supposedly objectionable parts of the novel actually serve to make the plaintiff's alleged counterpart a heroine. *See, e.g., Weaver v. Grafio*, 595 A.2d 983 (D.C. 1991) (finding that the sending of a letter to the D.C. Bar by the defendant, in which he falsely accused two attorneys of committing a felony was not outrageous). *See also,*

Tackett v. KRIV-TV, 22 Media L. Rep. (BNA) 2092 (S.D. Tex. 1994) (finding that an accusation against a doctor claiming he was selling children for large sums of money was not sufficiently reprehensible as to be beyond the bounds of decency). Finally, as discussed earlier, the plaintiff has provided no basis for the belief that the defendant knew the plaintiff at all. The speculation on the part of the plaintiff that defendant Spruill may have heard about her is insufficient to show that there is a genuine issue of fact for trial. The defendant could not have "intentionally" inflicted emotional distress on the plaintiff if he did not even know her. Without the intent element, the plaintiff must fail. For these reasons, the Court will grant the defendants' motion for summary judgment on Counts XIII and XIV.

5. Plaintiff's Motion to Amend the Complaint

Federal Rule of Civil Procedure 15(a) states that "a party may amend [her] pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). However, once a responsive pleading has been filed, "a party may amend [her] pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). The defendants responded to the complaint on September 16, 1996, long before the plaintiff filed the motion for leave to file an amended complaint on February 28, 1997. Therefore, she may only amend her Complaint if the Court gives her leave to do so. The question for the Court, therefore, is whether justice requires leave to amend in this case.

To determine whether justice requires granting leave to file an amended complaint, the Court must evaluate whether undue prejudice will be caused by granting this request. The only difference between the original complaint and the amended version was the addition of the claim of copyright infringement against both defendants.

Upon review of the facts available, including a copy of the amended complaint that the plaintiff wishes to file, the Court finds that justice does not require granting the plaintiff leave to amend.

The two additional counts are completely unrelated to the other fourteen counts in the original complaint. Adding these claims six months after the defendants have already responded would be prejudicial and not warranted, especially given the fact that any amendment to the Complaint would delay decision of the dispositive motions in this case which are also the subject of this Memorandum Opinion. Also, it is simply not necessary for the plaintiff to file the copyright infringement claims against the defendant in the present case since she has a suit pending in the District Court in the Southern District of New York alleging the same copyright claims against the identical defendants.[4]

CONCLUSION

For the reasons set forth above, the Court will grant summary judgment for the defendants on all counts of the complaint and deny the plaintiff's motion for leave to amend her complaint. An Order will accompany this Memorandum Opinion.

July 31th, 1997

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

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[4] Case No. 97 Civ. 0690 (S.D.N.Y.), filed February 3, 1997.

[Filed Aug. 1, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 96-1641 (TFH)

M. MAUREEN POLSBY, M.D.,
Plaintiff,

v.

STEVEN G. SPRUILL, *et al.*,
Defendants.

ORDER

Pending before the Court are (1) the Plaintiff's Motion for Leave to File an Amended Complaint, and (2) the Defendants' Motion to Dismiss and/or for Summary Judgment. For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Plaintiff's Motion for Leave to File an Amended Complaint is DENIED; and it is further

ORDERED that the Defendants' Motion to Dismiss and/or for Summary Judgment is GRANTED and this case is DISMISSED.

July 31st, 1997

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

[Filed Feb. 12, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 96-1641 (TFH)

M. MAUREEN POLSBY, M.D.,
Plaintiff,

v.

STEVEN G. SPRUILL, *et al.*,
Defendants.

ORDER

Pending before the Court is defendant Uldis Klavins's Motion to Dismiss for Lack of Personal Jurisdiction. Plaintiff brought this action in D.C. Superior Court after a conflict of interest problem with her counsel led to the dismissal without prejudice of a complaint originally filed in this Court. Plaintiff's complaint made no mention of the basis for the exercise of personal jurisdiction by the Superior Court. Before making any other response, defendants filed a timely Notice of Removal to this Court on July 15, 1996 based on diversity of citizenship. Defendant Klavins then filed a Motion to Dismiss for Lack of Personal Jurisdiction. After consideration of the submsisions by the parties, the Court will grant defendant's Motion to Dismiss for Lack of Personal Jurisdiction.

DISCUSSION

As a threshold matter, plaintiff argues that by moving for removal in the D.C. Superior Court defendant Klavins waived his right to challenge jurisdiction in this Court. However, it is well settled that requesting removal constitutes a special, rather than a general, appearance. *General Investment Co. v. Lake Shore Railway*, 260 U.S. 261, 268-69 (1922) (holding defendant did not waive

challenge to sufficiency of process by moving for removal). When appearing specially and moving to remove the case to federal court, the defendant does not waive the right to challenge personal jurisdiction. *Morris & Co. v. Scandinavia Ins. Co.*, 279 U.S. 405, 409 (1929) (holding that defendant did not waive challenge to personal jurisdiction by moving for removal). Therefore, the defendant did not waive his right to challenge the basis for personal jurisdiction by moving to remove the case to this Court.

Personal jurisdiction over defendant Klavins is proper only under the District's long-arm statute, D.C. Code Ann. § 13-423, because he does not reside in the District or have his principal place of business here. *Reuber v. United States*, 750 F.2d 1039, 1049 (D.C. Cir. 1984). The District's long-arm statute provides for personal jurisdiction based on a defendant's:

> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia; [or]
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered in the District of Columbia.

D.C. Code Ann. § 13-423(a) (1981 ed.). Plaintiff alleges no facts either in her complaint or her opposition to this motion that would give the Court jurisdiction over defendant Klavins under § 13-423(a).

Plaintiff presents three possible bases for personal jurisdiction in her opposition. First, she states that the defendant drew a likeness of her which appeared in *Good Housekeeping Magazine*. The magazine was mailed into the District of Columbia where she, the plaintiff, lives and works. Second, plaintiff argues that all of defendant's illustrations for the magazine story were set in the Washington, D.C. metropolitan area. Third, she argues that the defendants, including Klavins, are all represented by the same Washington, D.C. law firm in this action.

Turning to plaintiff's first argument, the court notes that this case is analogous to *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir. 1996), where the plaintiff sued the writer of an article for a magazine distributed nation-wide, including in the District of Columbia. *Id.* at 1299. The writer wrote the story in New York and did not transact any business in the District. *Id.* at 300. The Court of Appeals for the District of Columbia Circuit held that there was no personal jurisdiction under the District's long-arm statute. *Id.* ("*writing* an article for publication that is circulated throughout the nation, including the District, hardly constitutes doing or soliciting business, or engaging in a persistent course of conduct, *within* the District") (emphasis in original).

In response to plaintiff's second argument, the Court finds that for jurisdictional purposes, the drawing of an illustration is no different than the writing of an article regardless of where it is set. Defendant did his drawing and conducted his business with *Good Housekeeping Magazine* outside of this jurisdiction. He cannot be hailed into court here just because he used Washington landmarks in his illustrations. The mere fact that defendant drew an illustration that was circulated in the District by a publication that was not his employer does not give this Court jurisdiction over him.

Finally, personal jurisdiction can only be exercised by a court over a defendant based on the conduct of the

defendant and not the location of the plaintiff or counsel representing defendant. Therefore, this Court lacks personal jurisdiction over defendant and must dismiss the case against him.[1]

For the above reasons, it is hereby

ORDERED that defendant Uldis Klavins's motion to dismiss for lack of personal jurisdiction is GRANTED, and this action is therefore DISMISSED as to defendant Uldis Klavins.

February 11th, 1997

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

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[1] Although the D.C. Court of Appeals has read subsection (1) of the long-arm statute to extend to the "limits of due process", *see Environmental Research Int'l v. Lockwood Green Eng.*, 355 A.2d 808 (D.C. 1976), plaintiff does not assert that argument here. However, even under this standard defendant's activity either in general or with regard to this specific transaction does not rise to the level of the minimum contacts necessary for personal jurisdiction.

[Filed May 27, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7148

M. MAUREEN POLSBY, M.D.,
Appellant

v.

STEVEN G. SPRUILL, *et al.*,
Appellees

Before: Williams, Sentelle and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed April 10, 1998, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed May 27, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7148

M. MAUREEN POLSBY, M.D.,
Appellant

v.

STEVEN G. SPRUILL, *et al.*,
Appellees

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

February 12, 1992

JAMA

The Journal of the American Medical Association

Harassment Linked to Fraud, Lawsuit Alleges

ALLEGATIONS that sexual harassment at the National Institutes of Health (NIH), Bethesda, Md. led to research fraud are now part of a federal lawsuit under the Racketeer Influenced Corrupt Organizations Act.

If false, the charges are a heinous insult to highly reputable researchers. If true, they constitute perhaps the most egregious example of what some women's health advocates say is the extent to which sexual harassment can be damaging not only to the women in medicine but to the science of medicine itself. (See preceding article.)

Maureen Polsby, MD, says it all started when she refused to go to bed with the man who recruited her for a medical staff fellowship at the (then) National Institutes of Neurologic and Communicative Disorders and Stroke (NINCDS), which since has been reorganized into the National Institute of Neurological Disorders and Stroke and the National Institute on Deafness and Other Communicative Disorders.

Thomas Chase, MD, who was clinical director and is now laboratory chief, says that "as a matter of policy" he does not comment on anything undergoing investigation. However, in court depositions he has denied all charges. Another author on the allegedly fraudulent paper calls the charges "preposterous and absurd."

Tests Challenged

Polsby says Chase gave her research ideas to male colleagues. She says that they then published papers in peer-reviewed journals based on her work. Certain tests were reported as being done that Polsby and at least one subject in the study say were not done.

A suit charging both sexual discrimination and fraud was dismissed by a US District Court judge in Maryland

December because Polsby had not filed her complaint within the existing 30-day statute of limitations (since raised to 90 days) on sex discrimination complaints by federal employees. She has now filed a new suit containing only the racketeering-provision allegations.

Calls for an investigation of the case outside of court apparently have not resulted in action to date. Sen Thomas A. Daschell (D, SD) requested the congressional General Accounting Office to investigate. An aide to the senator says the General Accounting Office turned the matter over to the the Inspector General's Office of the Department of Health and Human Services. However, a spokesperson for the Inspector General's Office says she is "not aware of any such case."

The government attorney handling the lawsuit, Elizabeth Gianturco, says she cannot confirm or deny any internal investigation of Polsby's charges at the NIH or by any other government agency. She says that no comment is ever made on pending litigation.

One Side of Story Being Told

According to Polsby, she was chief resident in her third year of a 3-year residency at the Tuft's New England Medical Center, Boston, Mass, when she left to take the NINCDS job with the understanding that she would receive 1 year's residency credit for her first 2 years' work.

Polsby alleges that after two months on the job, she turned down a sexual proposition from Chase, and that he then "threw me to the wolves. I got assigned all the scut work, which none of the male fellows did, and saw patients no one else wanted to see." A male fellow who started at the same time as Polsby was allowed to do his own research full-time, she says.

Polsby says that when she did accomplish work with promising results, Chase took projects away from her and gave them to male colleagues. The third time this alleg-

edly happened, with a study using amitriptyline hydrochloride to treat spasmodic torticollis, she says, she decided to fight for the project. She filed an Equal Employment Opportunity (EEO) complaint.

Polsby charges that, in retaliation for her EEO complaint, Mark Hallett, MD, clinical director of the NINCDS, wrote the American Board of Psychiatry and Neurology that, due to an NIH policy change, Polsby could not use her 2 years as a fellow toward completion of her residency, which meant that she was not board eligible. Hallett's office referred all inquiries to Gianturco.

Only after she filed a sexual discrimination lawsuit, Polsby says, did she learn about a published paper that she says is fraudulent. She then filed another lawsuit, in January 1990, charging fraud and racketeering along with sex discrimination. Within days of filing that suit, Polsby says, she received a letter from the American Board of Psychiatry and Neurology board saying that she is board eligible in neurology.

Patient Says Test Not Done

Richard J. Duggan, a retired college English teacher from Ventnor, NJ, who says he was a subject in the disputed study, first discovered what he also alleges are false statements in the paper entitled "Personality Variables, Neurological and Psychopathological Symptoms in Patients Suffering From Spasmodic Torticollis" (*Compr Psychiatry*.1988;29:182-187).

Polsby is listed as fourth author, but she says she knew nothing of the paper until Duggan, who was editor of a newsletter for a patient support group, ran across it while doing a MEDLINE search for story ideas and told her about it.

The *Comprehensive Psychiatry* paper says that patients were given computed tomographic scans, cervical spine roentgenograms, and psychiatric explorations. "None of

this ever happened to me," says Duggan. Duggan says eight other patients he knew in the study also told him that such tests were not performed on them. The paper says 32 patients were studied, but Duggan says he and the other patients can think of only one other person in the study.

"The thing I know is not true, and that I would go to court for, is the methods section of the article. If this is what they did, then I was not in the group or the data were totally fabricated," says Duggan.

A nurse practitioner who served as patient coordinator for NINCDS torticollis studies confirms that Duggan was a subject, but says she does not remember which patients were in what studies, or what tests individual patients had. She also says that at the time she did not know of other patients besides those Duggan knew of, "but obviously there were."

The editor-in-chief of *Comprehensive Psychiatry*, Ralph A. O'Connell, MD, says the first he heard of any of these allegations was *JAMA*'s inquiry in early January.

"The only thing I can tell you," says O'Connell, "is that the second author, Dan Weinberger, MD, is really top flight. This is coming out of a very reputable laboratory."

O'Connell adds that Polsby "must have signed a copyright release." She maintains, however, that she was never informed that her name would appear on the paper, disagrees with its conclusions and methods, and was unaware its existence until after its publication.

Preposterous, Says Coauthor

Weinberger, chief of the clinical brain disorders branch at the National Institute of Mental Health, says that Polsby's charges are "preposterous, absurd. There's really nothing else to be said about it."

Weinberger says he is not aware of any sexual harassment "that ever was perpetrated toward Polsby at all." While he says he is not aware of any ongoing investigation, he also says he is sure an investigation would show that the published results were an accurate reflection of the research that was done. He maintains that the work was done primarily by the paper's first author, Deter Naber, MD, who has since reportedly returned to Germany. Efforts to reach him were unavailing.

In court depositions, the defendants deny all charges, and Chase contends that Polsby had failed to show up for rounds, was "difficult to control," had misdiagnosed a patient, and administered drugs without proper authority. Polsby acknowledges that she was sometimes late, but no more so than her male colleagues. She maintains that the diagnosis Chase questions was correct, and that use of the drug Chase cites in his deposition, baclofen, was approved by the Food and Drug Administration.

"It's a really sad thing" that Polsby is pursuing the case "rather than doing something herself," Weinberger concludes.

Polsby says one of the main reasons she is "fighting this fight is to try to expose what goes on and to get things to change."—by Paul Cotton

(MN&P continues on p. 786.)

Had Dr. Polsby been permitted to file an appeal brief, her appeal might have raised the following questions:

1. Whether an individual has a right to ownership of the commercial value of her own identity.

2. Whether the identity of an individual includes the persona and life story of the individual.

3. Whether ownership of an individual's identity includes ownership of any fictionalized account of the individual and her life which is then marketed for its entertainment value.

4. Whether unauthorized publication of a fictionalized account of a person's life story unfairly deprives that person of her ability to sell her story and thereby unfairly deprives her of her property.

5. Whether unpermitted commercial use of a person's identity constitutes invasion of privacy.

6. Whether an individual has a right to exercise control over the commercial exploitation of her identity.

7. Whether a fictionalized account of an individual, in which that person is still recognizable as her and only her, constitutes false light because of the fictional aspects of the account.

8. Whether celebrities and non-celebrities alike posses a right of publicity.

9. Whether celebrities have the right to prevent unpermitted commercial exploitation of their persona.

10. Whether non-celebrities have the right to prevent unpermitted commercial exploitation of their persona.

11. Whether there is a distinction between public figures who have freely chosen a public life, such as politicians and entertainers, and public figures who have become public figures primarily due to the facts of their private lives.

12. Whether testifying before congress makes an individual a public figure and thereby deprives that person of legal rights she would otherwise have.

13. Whether Dr. Polsby is a public figure.

14. Whether the reading in public of what an author has written thereby puts that writing into the public domain.

15. Whether the district court erred in stating that Dr. Polsby's claims must fail because some of defendants' story was not misappropriated from her.

16. Whether defendants' assertion, with some concurrence by the court, that Dr. Polsby's story is a work of fiction, equates to an admission by defendants that the story is Dr. Polsby's intellectual property, and whether the defendants should suffer the consequences of having made such an argument.

17. Whether the district court judge inappropriately usurped the jury's role as fact finder and inappropriately ruled on a motion for summary judgment under Fed. R. Civ. P., Rule 56, based on his opinion of the merits of Dr. Polsby's claims.

18. Whether the district court's opinion, and it's rationale for that opinion, were proper under Fed. R. Civ. P., Rule 56, and whether Dr. Polsby's case should have been dismissed under Rule 56 prior to discovery.

19. Whether the district court judge may have been biased against Dr. Polsby.

20. Whether the district court erred in dismissing the claims against Uldis Klavins prior to discovery.

21. Whether the district court erred in failing to address the remaining defendant's unauthorized use of Dr. Polsby's likeness.

22. Whether the district court erred in denying Dr. Polsby leave to amend her complaint to add copyright infringement claims.